APPENDIX A

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

No. 09-3297

OFC COMM BASEBALL, an unincorporated association doing business as Major League Baseball; NATL BASKETBALL ASSN, a joint venture; NATL COLLEGIATE ATHLETIC ASSN, an unincorporated association; NATL FOOTBALL LEAGUE, an unincorporated association; NATL HOCKEY LEAGUE, an unincorporated association,

Appellants,

v.

JACK A. MARKELL, Governor of the State of Delaware; WAYNE LEMONS, Director of the Delaware State Lottery Office,

Appellees.

Argued Aug. 24, 2009.
Filed Aug. 31, 2009

Before McKEE, FUENTES and HARDIMAN, *Circuit Judges*.

OPINION OF THE COURT

HARDIMAN, *Circuit Judge*.

In this interlocutory appeal we review an order of the United States District Court for the District of Delaware denying a motion for preliminary injunction filed by the National Football League, the National Basketball Association, the National Hockey League,

the Office of the Commissioner of Baseball, and the National Collegiate Athletic Association (collectively, Leagues). The Leagues sought to enjoin Delaware state officials from implementing certain elements of its Sports Lottery Act (Act), Del. Laws Ch. 28 (H.B. No. 100) (2009), 29 Del.Code § 4801 *et seq.*, on September 1, 2009. As we shall explain, we need not decide whether the District Court's denial of the Leagues' preliminary injunction was proper because we hold as a matter of law that elements of Delaware's sports lottery violate federal law.

I.

In March 2009, the Governor of Delaware, Jack Markell, proposed legislation authorizing sports betting and table gaming at existing and future facilities in Delaware. On March 19, Governor Markell sought an advisory opinion from the Delaware Supreme Court pursuant to 10 Del.Code § 141 and 29 Del.Code § 2102, regarding the constitutionality of his proposal under the Delaware Constitution. In a letter to the Delaware Supreme Court, Governor Markell described three types of proposed sports gambling: (1) point-spread bets on individual games; (2) over/under bets on individual games; and (3) multi-game parlay bets.[1] On May 14—while the request for an advisory opinion

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[1] Under regulations proposed pursuant to the Act, Delaware intends to offer three games: Single Game Lottery, Total Lottery, and Parlay Lottery. In Single Game Lottery, bettors must select the winning team in a single sports contest against a point spread. In Total Lottery, the bettor gambles on whether the total number of points scored by both teams in a single contest will be over or under a specified sum. The final game, Parlay Lottery, combines elements of the first two games in asking bettors to correctly choose the winners of two or more sports contests, or two or more over/under bets, or some combination of winners and over/under bets.

from the Delaware Supreme Court was pending—Governor Markell signed the Act into law. *In re Request of Governor for an Advisory Opinion (In re Request of Governor)*, —A.2d—, No. 150, 2009, 2009 WL 1475736, at *2 (Del. May 27, 2009).

After hearing oral argument, the Delaware Supreme Court issued an opinion on May 29, which found that multi-game betting would not violate state law. In analyzing the legality of the Act and the "lotteries" proposed pursuant to the Act, the Delaware Supreme Court relied heavily on Judge Stapleton's decision in *National Football League v. Governor of the State of Delaware (NFL)*, 435 F.Supp. 1372 (D.Del.1977). That case concerned the NFL's challenge to a sports betting scheme known as "Scoreboard" that Delaware conducted during the 1976 season. Scoreboard was comprised of three games: Football Bonus, Touchdown, and Touchdown II. In Football Bonus, the State offered two pools of seven NFL games each and bettors had to predict the winners—without a point spread—in one or both of the pools. In Touchdown, bettors selected both the winners and point spreads for either three, four, or five NFL games. Finally, Touchdown II—which replaced Touchdown midway through the season—required bettors to pick the winners, against the point spread, for between four and twelve NFL games. All of the Scoreboard games conducted in 1976 were confined to betting on the NFL, and all required that the bettor wager on more than one game at a time.

In *NFL*, Judge Stapleton held such wagering was permissible under the Delaware Constitution because chance is the "dominant factor" in multi-game (parlay) betting. The Delaware Supreme Court reached the same conclusion in its advisory opinion, *In re Request of Governor*, 2009 WL 1475736, at *8, but did

not decide the constitutionality of single-game betting, except to recognize that it differs from the parlay games addressed by Judge Stapleton. *Id.* The Delaware Supreme Court did not address the federal statutory question presented in this appeal.

Following receipt of the Delaware Supreme Court's advisory opinion, on June 30 the State published its proposed regulations to implement the Act (Regulations). According to the Regulations, Delaware intends to implement a sports betting scheme that would include wagers "in which the winners are determined based on the outcome of any professional or collegiate sporting event, including racing, held within or without the State, but excluding collegiate sporting events that involve a Delaware college or university, and amateur or professional sporting events that involve a Delaware team." A168. Delaware's proposed sports betting scheme includes single-game betting in addition to multi-game (parlay) betting, as the Regulations define the term "maximum wager limit" to include "the maximum amount that can be wagered on a *single sports lottery wager be it head-to-head or parlay*. . . . " A168 (Regulations § 2.0, definition of "maximum wager limit") (emphasis added).

Delaware intends to commence its sports betting scheme on September 1, 2009, in time for the start of the upcoming NFL regular season. Though the NFL is its focus, Delaware intends to conduct—and the Regulations sanction—betting on all major professional and college sports.

II.

On July 24, the Leagues filed a complaint against Governor Markell and Wayne Lemons, the Director of the Delaware State Lottery Office (collectively, Delaware or State), claiming that elements of Dela-

ware's proposed sports betting scheme violate the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3701, *et seq.*[2] Although PASPA has broadly prohibited state-sponsored sports gambling since it took effect on January 1, 1993, the statute also "grandfathered" gambling schemes in individual states "to the extent that the scheme was conducted by that State" between 1976 and 1990.

Four days after filing their complaint, the Leagues filed a motion for preliminary injunction, requesting that the District Court enjoin the State "from commencing, instituting, operating and maintaining a proposed 'sports lottery' to the extent that such lottery permits (i) single-game sports betting, (ii) betting on sports other than professional football, or (iii) any other sports betting scheme that was not conducted by the State of Delaware in 1976" pending final adjudication of the Leagues' action.

The District Court held a scheduling conference on July 29 at which it urged the parties to reach an agreement by which the State would "stand down" pending an expedited adjudication of the merits. A268. The parties could not reach such an agreement, however, so the District Court asked for written submissions and held a conference on August 5. Following the conference, the court orally denied the Leagues' motion and scheduled a trial for December 7. On August 10, the District Court issued a 13-paragraph memorandum order explaining its reasons for denying the injunction.

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[2] The PASPA claim was brought at Count I. The Leagues also brought a claim under state law at Count II, which alleged that the sports betting scheme violates Section 17 of the Delaware Constitution because it does not constitute a permissible "lottery." The state-law claim is not at issue in this appeal.

In its memorandum order, the District Court found that the Leagues had not shown a likelihood of success on the merits. *Office of Comm'r of Baseball v. Markell*, 2009 WL 2450284, at *1 (D.Del. Aug. 10, 2009). Noting that "both sides vigorously and ably contend that they are entitled to win on the merits," the District Court stated: "On the current record, the court is simply not in a position to give either side a nod on the merits. Indeed, there may exist factual disputes as to what, if anything, the State of Delaware actually did in the past with respect to sports gambling; or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue." *Id.* at *2. The District Court also noted that the Leagues suggested in their letter brief that the court treat their motion for preliminary injunction as a motion for summary judgment and questioned whether the Leagues had demonstrated both the requisite irreparable harm and that the balance of the equities fell in their favor. *See id.* at *2-4.

On August 7—prior to receipt of the District Court's memorandum opinion—the Leagues filed their notice of appeal. Three days later, the Leagues filed a motion to expedite their appeal and their opening brief. On August 12, Delaware filed a motion to dismiss the appeal and its opposition to the Leagues' motion to expedite. On August 13, we granted the Leagues' motion to expedite, issued a briefing schedule, and set oral argument for August 24.

It is often noted that the wheels of justice move slowly—and for good reason. As the procedural history of this case demonstrates, however, that is not always the case. When a party seeks injunctive relief, the stakes are high, time is of the essence, and a straightforward legal question is properly presented

to us, prudence dictates that we answer that question with dispatch.

III.

We begin, as always, by considering whether we have jurisdiction to hear this appeal. The Leagues claim we have jurisdiction under 28 U.S.C. § 1292(a), which provides: "courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, *refusing*, or dissolving injunctions." (emphasis added). The State disagrees, arguing that we must apply the test set forth in *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981), which requires the Leagues to show that the District Court's denial of the motion for preliminary injunction (1) will have a serious, perhaps irreparable, consequence; and (2) can be effectively challenged only by immediate appeal. *Id.* at 83, 101 S.Ct. 993; *see also Stringfellow v. Concerned Neighbors In Action*, 480 U.S. 370, 379, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987).

In arguing that the Leagues must establish the *Carson* factors, Delaware relies on dicta from some of our prior cases stating that both orders expressly denying injunctions and orders having the practical effect of denying injunctions must meet the two-prong *Carson* test. *See Vuitton v. White*, 945 F.2d 569, 574 (3d Cir.1991); *Ross v. Zavarella*, 916 F.2d 898, 902 (3d Cir.1990). But none of the cases upon which Delaware relies involved *express denials* of injunctive relief; rather, they dealt with orders that were alleged to have the *practical effect* of denying injunctive relief. Accordingly, the Leagues need not demonstrate that the order will have a "serious, perhaps irreparable, consequence" and can be "effectively challenged" only by immediate appeal. *See*

Cohen v. Bd. of Trs. of Univ. of Med., 867 F.2d 1455, 1464 (3d Cir.1989). The language of § 1292(a)(1) is clear and the Leagues need not satisfy any jurisdictional hurdle beyond the fact that they have appealed from an order refusing to enter an injunction.

We next turn to the scope of our review under 28 U.S.C. § 1292(a). We have adopted a broad view of appellate jurisdiction under this section. *See Kershner v. Mazurkiewicz*, 670 F.2d 440, 445 (3d Cir.1982); *see also* 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3921.1, at 28 (2d ed. 1996) ("Jurisdiction of the interlocutory appeal [under § 1292(a)(1)] is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development."). Moreover, we have held that "[w]hen an appeal is taken from an order made appealable by statute, we have all the powers with respect to that order listed in 28 U.S.C. § 2106."[3] *United Parcel Serv., Inc. v. U.S. Postal Serv.*, 615 F.2d 102, 107 (3d Cir.1980). Accordingly, we have broad authority to decide this case as appropriate under § 2106.

Having determined that we have authority to address all aspects of this case, we must determine whether it is proper to exercise that authority. "As a general rule, when an appeal is taken from the grant

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[3] Section 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

or denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal." *Callaway v. Block*, 763 F.2d 1283, 1287 n. 6 (11th Cir.1985). This ordinarily requires that we review the decision to grant or deny a preliminary injunction for abuse of discretion, employing the standard four-factor test. *See Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir.1999). Nevertheless, the Supreme Court has held the "general rule" of limited review is one of "orderly judicial administration, not a limit on judicial power." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), *overruled on other grounds by Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

In *Thornburgh*, the Supreme Court considered whether this Court properly exercised its jurisdiction in striking down portions of a Pennsylvania statute following an appeal from the district court's partial denial of a preliminary injunction. *See id.* at 755-57, 106 S.Ct. 2169. The Supreme Court acknowledged that review of a preliminary injunction is normally limited to the injunction itself, but explained: "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Id.* At the same time, the Supreme Court cautioned: "A different situation is presented . . . when there is no disagreement as to the law, but the probability of success on the merits depends on facts that are likely to emerge at trial." *Id.* at 757 n. 8, 106 S.Ct. 2169. In affirming this Court's decision to address the merits of the plaintiff's case, the Supreme Court quoted from our opinion:

> Thus, although this appeal arises from a ruling on a request for a preliminary injunction, we have before us an unusually complete factual and legal presentation from which to address the important constitutional issues at stake. The customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law.

Id. at 757, 106 S.Ct. 2169 (quoting *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 290 (3d Cir.1984)).

The approach taken in *Thornburgh* has been embraced by a number of our sister courts of appeals. In an appeal from the grant of a preliminary injunction in *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir.2000), the Court of Appeals for the Eighth Circuit exercised its discretion to reach the merits of the underlying dispute, determining that it was "faced with a purely legal issue on a fixed . . . record." *Id.* at 1186-87. The court explained: "[t]he considerations that caution against a broad scope of review in the usual interlocutory appeal—that is, a tentative and provisional record with conflicting material facts—simply are not present here." *Id.* at 1187. Likewise, in *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir.2005), the Court of Appeals for the Eleventh Circuit assessed the merits of the plaintiff's First Amendment claim on appeal after the district court denied his request for a preliminary injunction. Finding that the facts of the case were "simple and straightforward, and the record need[ed] no explanation," *id.* at 1274, the court explained that "we do not think it necessary or prudent to confine our opinion to holding that [the plaintiff] has shown a *likelihood* of success on the

merits, when it is altogether clear that [the plaintiff] *will* succeed on the merits of its First Amendment claims," *id.* at 1272 (emphasis in original). Finally, in *Doe v. Sundquist*, 106 F.3d 702 (6th Cir.1997), the Court of Appeals for the Sixth Circuit considered the merits of the plaintiffs' claim following a denial of their preliminary injunction motion. The court noted that "[i]f an issue unaddressed by the district court is presented with sufficient clarity and completeness and its resolution will materially advance the progress of the litigation," consideration of that issue is proper. *Id.* at 707 (internal quotation marks and citation omitted). The court explained that "[t]he sort of judicial restraint that is normally warranted on interlocutory appeals does not prevent us from reaching clearly defined issues in the interest of judicial economy." *Id.* (citation omitted).

In light of *Thornburgh* and its progeny, we must determine whether the record in this appeal presents "a pure question of law" that is "intimately related to the merits of the grant [or denial] of preliminary injunctive relief," *United Parcel Serv.*, 615 F.2d at 107, or whether the Leagues' "probability of success on the merits depends on facts that are likely to emerge at trial," *Thornburgh*, 476 U.S. at 757 n. 8, 106 S.Ct. 2169. For the reasons that follow, we conclude that this case falls into the former category.

In denying the Leagues' motion for preliminary injunction, the District Court hypothesized that "there *may* exist factual disputes as to what, if anything, the State of Delaware actually did in the past with respect to sports gambling or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue." *Markell*, 2009 WL 2450284, at *2 (emphasis added). Contrary to the District Court's

supposition, we have reviewed the record and cannot find any material issues of fact in dispute. As the Leagues rightly argue, Judge Stapleton's opinion in *NFL* is the definitive word regarding the scope and extent of Delaware's gambling scheme as it was conducted in 1976; the State neither challenged Judge Stapleton's findings 33 years ago nor does so now. Likewise, the parties do not dispute the scope and extent of the sports gambling scheme that Delaware intends to implement on September 1. As counsel for Delaware properly and candidly conceded at oral argument, the State intends to conduct widespread betting on both professional and college sports beyond the scope of the football-only parlays permitted in 1976. In sum, the parties agree upon what Delaware did in 1976 and what Delaware intends to do now. Given the absence of any disputed issue of material fact—as confirmed by both parties at oral argument—we conclude that this case does not turn on a "legal issue that might be seen in any different light after final hearing," *United Parcel Serv.*, 615 F.2d at 107, and is ripe for adjudication as a matter of law. Therefore, we will proceed to assess the merits of the Leagues' claim that Delaware's sports betting scheme violates PASPA.[4]

IV.

We begin our legal analysis with the statutory language. PASPA prohibits any person or governmental entity from sponsoring, operating, advertising or promoting:

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[4] Because we reach the merits of this case, we need not consider the parties' arguments regarding irreparable harm and the balancing of the equities.

> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702. The statute contains four exceptions, only one of which is relevant here. That exception provides that PASPA's general prohibition against sports betting shall not apply to: "lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, ***to the extent that the scheme was conducted by that State*** or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990." 28 U.S.C. § 3704(a) (emphasis added).

Not surprisingly, the parties view PASPA's language differently, with both sides claiming that the plain language requires a favorable result on the merits.

A.

Delaware contends that its sports betting scheme qualifies for the exception in § 3704(a)(1), claiming: "[t]he plain language of the pertinent PASPA exemption allows Delaware to reintroduce a sports lottery under State control because Delaware conducted such a scheme at some time between January 1, 1976, and August 31, 1990." Del. Br. at 3. The State also contends that the exemption "is broad in scope, and nowhere states that it restricts Delaware to operating particular lottery games for a particular sport." *Id.* at 32. In Delaware's view, § 3704(a)(1) allows it to conduct any "sports lottery under State control," *id.*, because it did

so in 1976. Although the State acknowledges, as it must, that the exception permits its lottery only "to the extent that the scheme was conducted," it argues that the word "scheme" refers neither to the three particular games it offered in 1976, nor to parlay betting in general, nor even to wagering on NFL games, but to a "sports lottery under State control in which the winners of lottery games were affiliated with the outcome of sporting events." *Id.* at 33.

Even assuming that Delaware's interpretation of the word "scheme" were persuasive, we must reconcile that interpretation with the statutory language "*to the extent* that the scheme *was conducted* by that State." (emphasis added). The State claims that this phrase merely "identifies a condition (*i.e.*, that a State must have conducted a sports lottery in the past in order to be permitted to operate a sports lottery in the future)," *id.* at 34, rather than limiting the State's gaming authority to either the particular sports or types of games previously offered. Delaware argues that because state law previously *authorized* a broad lottery encompassing many types of games and many sports, it may now *institute* a broad lottery with those features.

In contrast to Delaware's argument, the Leagues contend that the exception in § 3704(a)(1) applies only to lotteries or other schemes "to the extent" that such lottery or scheme "was conducted" by the State between January 1, 1976 and August 31, 1990. The Leagues insist that it is not sufficient that a particular lottery may have been contemplated, or even authorized, but rather we must consider the specific means by which the lottery was *actually conducted.*

We agree with the Leagues' interpretation. As the exception found at § 3704(a)(2) makes clear, there is

a distinction between wagering schemes that were merely "authorized" and those that were "conducted." *See* 28 U.S.C. § 3704(a)(2) (which applies to a wagering scheme that was both (i) "authorized by a statute as in effect on October 2, 1991," and (ii) "actually was conducted during the period beginning September 1, 1989 and ending on October 2, 1991"). Whatever the breadth of the lottery authorized by Delaware state law in 1976, PASPA requires us to determine "the extent"—or degree—to which such lottery *was conducted*. We cannot hold—as the State impliedly suggests—that Congress meant to conflate "authorized" and "conducted." *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) ("It is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another."); *Alaka v. Attorney General*, 456 F.3d 88, 97-98 (3d Cir.2006) ("It is a fundamental canon of statutory construction that where sections of a statute do not include a specific term used elsewhere in the statute, the drafters did not wish such a requirement to apply."). Thus, the sole exception upon which Delaware relies—applicable to wagering schemes dating back to 1976—applies only to schemes that were "conducted." 28 U.S.C. § 3704(a)(1).

While minimizing the importance of the language of § 3704(a)(2), Delaware asks us to draw parallels to § 3704(a)(3), which provides:

> a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only *to the extent* that—(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this

> chapter, to be operated in that municipality; and (B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive State regulation authorized by that State's constitution and applicable solely to such municipality[.]

(emphasis added). Delaware argues that the phrase "to the extent" must mean the same thing in § 3704 (a)(1) as it does in § 3704(a)(3), where the phrase identifies a condition. We reject this argument out of hand because the exception contained in § 3704 (a)(3)—which deals with casinos—differs in subject matter, structure, and syntax from the language of § 3704(a)(1).

As a fallback position, Delaware argues that PASPA is ambiguous such that resort to legislative history is necessary. We disagree, because as we have noted:

> A statutory provision is not ambiguous simply because by itself, [it is] susceptible to differing constructions because in addition to the statutory language . . . itself, we take account of the specific context in which that language is used, and the broader context of the statute as a whole. We assume, for example, that every word in a statute has meaning and avoid interpreting one part of a statute in a manner that renders another part superfluous.

Disabled in Action v. SEPTA, 539 F.3d 199, 210 (3d Cir.2008) (internal quotations and citations omitted). Applying these principles of statutory construction, we find unambiguous the phrase "to the extent that the scheme was conducted by that State," so our "inquiry comes to an end." *Kaufman v. Allstate N.J.*

Ins. Co., 561 F.3d 144, 155 (3d Cir.2009) (citation omitted).[5]

Because we do not find PASPA ambiguous, we find unpersuasive Delaware's argument that its sovereign status requires that it be permitted to implement its proposed betting scheme. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) ("[A]bsent an unmistakably clear expression to

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[5] Delaware spends several pages of its brief explaining the legislative history and citing statements from various legislators. These statements are inconclusive at best. When we view them in their entirety rather than focusing on "cherry-picked" snippets, they offer no consistent insight into Congressional intent. For example, the Senate Report upon which Delaware relies, Del. Br. at 13, states that the exemption in § 3704(1) "is not intended to prevent . . . Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law . . . . At the same time, paragraph (1) does not intend to allow the expansion of sports lotteries into head-to-head betting . . . . " A152 (Senate Report). This excerpt from the Senate Report is unhelpful in two respects. First, it is at odds with PASPA's statutory language. Second, it contradicts Delaware's claim that single-game wagering is permitted. Similarly unhelpful are the many statements of individual legislators cited by Delaware because such "cherry-picked" statements cannot be deemed to reflect the views of other legislators, much less of a majority of those who enacted the statute. *Szehinskyj v. Attorney General*, 432 F.3d 253, 256, (3d Cir.2005) ("[Appellant's] selective invocation of fragments of the floor debate is an object lesson in the perils of appealing to this particular kind of legislative history as a guide to statutory meaning. This case is a perfect illustration of the well-known admonition that what individual legislators say a statute will do, and what the language of the statute provides, may be far apart indeed. The law is what Congress enacts, not what its members say on the floor."). In sum, we conclude that "[t]he legislative history is more conflicting than the text is ambiguous," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49, 70 S.Ct. 445, 94 L.Ed. 616 (1950), and does not support the State's position.

alter the usual constitutional balance between the States and the Federal Government, [federal courts] will interpret a statute to preserve rather than destroy the States' substantial sovereign powers.") (internal quotations omitted). PASPA unmistakably prohibits state-sponsored gambling, 28 U.S.C. § 3702, subject to certain exceptions, 28 U.S.C. § 3704. Through PASPA, Congress has "altered the usual constitutional balance" with respect to sports wagering, although Delaware retains the right to implement a sports wagering scheme "to the extent that the scheme was conducted" previously. Those words of limitation are not rendered nugatory by generalized notions of "state sovereignty."

Finally, Delaware argues that we cannot construe the language "to the extent that the scheme was conducted" so narrowly because doing so would render the PASPA exception a nullity. Certain aspects of Scoreboard were deemed impermissible by either Judge Stapleton, *NFL*, 435 F.Supp. at 1387-88 (holding that Touchdown II violated the lottery provision of the Delaware Constitution by utilizing a fixed-payoff scheme), or the Delaware Supreme Court, *Op. of the Justices*, 385 A.2d 695, 705 (Del.1978) (striking down Football Bonus and Touchdown because they awarded prizes on a pari-mutuel basis in violation of the State's Constitution). Consequently, the State reasons that if it is confined to the exact scheme conducted in 1976, the exception would be illusory as applied to Delaware. The State argues that Congress could not have intended this result, especially when the legislative history makes clear that Delaware was one of only four states that were intended beneficiaries of the exception. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)

(courts should disfavor interpretations of statutes that render language superfluous).

Delaware's reading overstates the narrowness of the exception provided by § 3704(a)(1). We do not hold that PASPA requires Delaware's sports lottery to be identical in every respect to what the State conducted in 1976. Certain aspects of the lottery may differ from the lottery as conducted in 1976, as long as they do not effectuate a substantive change from the scheme that was conducted during the exception period. For example, as the State aptly noted—and the Leagues conceded—at oral argument, "to the extent the scheme was conducted" cannot mean that Delaware could institute a sports betting scheme for only four months as was done in 1976. Likewise, Delaware is neither limited to selling tickets at identical venues nor prohibited from allowing wagering on NFL teams that did not exist in 1976. Such *de minimis* alterations neither violate PASPA's language nor do violence to its central purposes, *viz.*, to limit the spread of state-sponsored sports gambling and maintain the integrity of sports. By contrast, expanding the very manner in which Delaware conducts gambling activities to new sports or to new forms of gambling—namely single-game betting—beyond "the extent" of what Delaware "conducted" in 1976 would engender the very ills that PASPA sought to combat. In construing statutes, we consider the statute's overall object and policy, and avoid constructions that produce "odd" or "absurd" results or that are "inconsistent with common sense." *Disabled in Action*, 539 F.3d at 210 (internal citations omitted).

B.

In light of our reading of PASPA, we determine what scheme Delaware may conduct in 2009 with reference

to the scheme it conducted in 1976. As Judge Stapleton held in *NFL*—and as was not disputed in the proceedings before either the District Court or our Court in this matter—the only sports betting scheme "conducted" by Delaware in 1976 involved the three Scoreboard games. That betting scheme was limited to multi-game parlays involving only NFL teams. Thus, any effort by Delaware to allow wagering on athletic contests involving sports beyond the NFL would violate PASPA. It is also undisputed that no single-game betting was "conducted" by Delaware in 1976, or at any other time during the time period that triggers the PASPA exception. *See NFL*, 435 F.Supp. at 1385 ("None of the [1976] games permits head-to-head or single game betting."). Because single-game betting was not "conducted" by Delaware between 1976 and 1990, such betting is beyond the scope of the exception in § 3704(a)(1) of PASPA and thus prohibited under the statute's plain language.

Under federal law, Delaware may, however, institute multi-game (parlay) betting on at least three NFL games, because such betting is consistent with the scheme to the extent it was conducted in 1976. Of course, we express no opinion regarding the legality of such a scheme under Delaware statutory or constitutional law.

For the foregoing reasons, we will vacate the order of the District Court and remand for proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. DELAWARE

C.A. No. 09-538 (GMS)

THE OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball, the NATIONAL BASKETBALL ASSOCIATION, a joint venture, the NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, the NATIONAL FOOTBALL LEAGUE, an unincorporated association, and the NATIONAL HOCKEY LEAGUE, an unincorporated association,

Plaintiffs,

v.

JACK A. MARKELL, Governor of the State of Delaware, and WAYNE LEMONS, Director of the Delaware State Lottery Office,

Defendants.

Aug. 10, 2009.

MEMORANDUM ORDER

GREGORY M. SLEET, *Chief Judge*.

1. On July 24, 2009, the plaintiffs filed the complaint in this action alleging, among other things, that the Delaware Sports Lottery Act (the "Act"), 29 Del. C. § 4825, and the regulations proposed pursuant to the Act violate the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et*

seq. and the Delaware Constitution, Del. Const. art. II, § 17. (D.I.1.)

2. On July 28, 2009, pursuant to Fed.R.Civ.P. 65(a), the plaintiffs filed a motion for a preliminary injunction seeking to enjoin the defendants from commencing any "sports lottery" that permits: "(i) single-game sports betting, (ii) betting on sports other than professional football, or (iii) any other sports betting scheme that was not conducted by the State of Delaware in 1976." (D.I.8.)

3. In the exercise of its discretion, the court has considered the applicable law, and carefully reviewed: (1) the pleadings filed thus far in this matter (D.I.1); (2) the federal statute at issue; (3) the plaintiffs' motion for preliminary injunction (D.I.8); (4) the plaintiffs' opening brief and attachments in support of their motion for preliminary injunction (D.I.9-12); (5) the parties' additional submissions filed in this case, including the plaintiffs' ten-page, single-spaced, letter brief (D.I.14), and the defendants' three-page, single-spaced, letter brief filed on August 3, 2009 (D.I.15), as well as the defendants' four affidavits filed on August 4, 2009 (D.I.17).

4. The court has also considered the arguments of counsel for the parties during a one-hour teleconference in this matter conducted on July 29, 2009 (D.I.13). After giving due consideration to all of these things, the court concludes that a preliminary injunction is not warranted in this case. The court will, therefore, deny the plaintiffs' motion.

5. With good reason, federal courts are typically reluctant to grant the type of relief requested here. Indeed, the Third Circuit has made clear that a "preliminary injunction is an extraordinary remedy

that should be granted only if: (1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant; and (4) granting the injunction is in the public interest." *NutraSweet Co. v. Vit-Mar Enterprises, Inc.*, 176 F.3d 151, 153 (3d Cir.1999) (citation omitted). "A plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." *See Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 192 (3d Cir.1990) ("Only if the movant produces evidence sufficient to convince the trial judge that all four factors favor preliminary relief should the injunction issue.")

6. First, based on the record as it stands, the court is not convinced that the plaintiffs will "likely succeed on the merits" in this case. *NutraSweet*, 176 F.3d at 153. In fact, both sides vigorously and ably contend that they are entitled to win on the merits. Indeed, the plaintiffs propose, despite the nascent nature of this action, that the court and the parties go straight into the summary judgment phase of the litigation. Specifically, at page 2 of their August 3, 2009 letter brief, the plaintiffs "ask the Court [ ] to treat plaintiffs' motion [for injunctive relief] as one for summary judgment." (D.I.14 at 2.) In addition, at page 7 of their letter brief, the plaintiffs write; "plaintiffs respectfully request that the Court treat their motion for a preliminary injunction as one for summary judgment on Count I of the Complaint, alleging violation of [the Professional and Amateur Sports Protection Act] PASPA." (*Id.* at 7.) Indeed, the plaintiffs propose, "that the Court schedule a summary judgment proceeding such that this matter can be decided prior to the first week of September 2009," and generously offer to rely on the combination of their brief in sup-

port of their motion for a preliminary injunction and their letter brief of August 3. (*Id.*)

7. In this matter, as whenever a party invokes the authority of the court, the ends of justice dictate a judge, where possible, proceed with deliberation and caution—especially when a party seeks extraordinary relief of the type at issue here. On the current record, the court is simply not in a position to give either side a nod on the merits. Indeed, there may exist factual disputes as to what, if anything, the State of Delaware actually did in the past with respect to sports gambling; or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue. On this record, and in light of these critical issues, the court cannot say that the plaintiffs will likely succeed on the merits.

8. Second, the court is not certain that the plaintiffs have demonstrated irreparable harm, so as to warrant the court granting preliminary injunctive relief. In enacting the federal legislation at issue here, Congress appears to have made specific findings as to the "harm" it intended to address. Nevertheless, and contrary to what the plaintiffs seem to suggest, in the context of a motion under Fed.R.Civ.P. 65(a), and considering the language of the actual statute at issue, these findings do not mandate or require under all circumstances that this court grant preliminary injunctive relief. In other words, this court is not convinced that the underlying statutorily defined harm is dispositive of the question as to whether the plaintiffs are entitled to preliminary injunctive relief or *per se* establishes the existence of the threat of irreparable harm that might necessitate the issuance of a preliminary injunction. To the contrary, Third Circuit precedent requires that the court consider

this factor along with and in the context of each of the factors courts traditionally consider when confronted with a request for a preliminary injunction. *See NutraSweet*, 176 F.3d at 153; *see also Opticians Ass'n*, 920 F.2d at 192 ("[w]hen ruling on such a motion, the district court must consider four factors").

9. In addition, it is noteworthy that when asked some 32 years ago by the National Football League, a party to this action, to grant preliminary injunctive relief barring the State of Delaware from instituting a lottery game based on games of the NFL, an issue at least related to the matter before the court today, in denying the NFL's request for a temporary restraining order, a respected, indeed, a distinguished judge of this court and now the Third Circuit Court of Appeals, Judge Walter K. Stapleton, wrote the following:

> I should add that the plaintiffs have not demonstrated that the existence of gambling on its games, *per se*, has or will damage its good will or reputation for integrity. By this, I do not suggest that an association of the NFL with a gambling enterprise in the minds of the public would not have a deleterious effect on its business. Such an association presupposes public perception of the NFL sponsorship or approval of a gambling enterprise or at least confusion on this score . . . . I do find, however, that the existence of gambling on NFL games, unaccompanied by any confusion with respect to sponsorship, has not injured the NFL and there is no reason to believe it will do so in the future. The record shows that extensive gambling on the NFL has existed for many years and that this fact of common public knowledge has not injured plaintiffs, or their reputation.

Nat'l Football League v. Governor of the State of Delaware, 435 F.Supp. 1372, 1378 (D.Del.1977).

10. Today, the court sees some irony in the fact that Judge Stapleton made his findings 16 years before the Congressional findings that underpin PASPA, and that another 16 years have elapsed since the passage of that Act and the reappearance of the NFL, along with other parties plaintiff, before this court making similar claims to being in imminent danger of having their reputations and good will compromised because of yet another attempt by Delaware to engage in gambling activity associated with professional football and other sports. The irony is this: during the course of the court's discussion with counsel on July 29, 2009, counsel for the defendants made some, apparently fact based assertions which, while certainly not the equivalent of evidence based findings of a court or the Congress of the United States, are, at least relevant to the court's consideration of the issue of irreparable harm when asked to grant a request for preliminary injunctive relief. Counsel observed:

> For example, the New York Times reported two years ago that the Motorcity Casino is owned by the same person who owns the Detroit Red Wings . . . Marian Ilitch co-owns the Detroit Red Wings with her husband Michael, Michael owns the Detroit Tigers . . . In the NBA, the Sacramento Kings [are] owned by the same people who own the Palms Casino in Las Vegas . . . The Chairman and CEO of Harrah's owns a stake in the Celtics [that would be the Boston Celtics] . . . There [are] plenty of instances where the NFL and other sports leagues allow broadcast affiliates to broadcast betting information, betting

> lines, injury reports . . . advice on which side of a bet to be on . . . Major League Baseball recently loosened its policy on casino and gambling sponsorship, so Harrah's Casino is a signature partner of the Mets . . . The Mohegan Sun Hotel & Casino operates a Mohegan Sports Bar at Yankee Stadium. The Brewers, the Braves, the Diamondbacks, the Angels, the Dodgers, the Marlins and the Cubs [all MLB baseball clubs] all have sponsorship deals with casinos and gambling interests or state lotteries . . . The NHL hosted its 2009 Player Awards in the Palms Casino.

(D.I.13 at 21-22.)

11. Clearly, circumstances have changed materially since Judge Stapleton issued his ruling in 1977, that is, the Congress has enacted PASPA. This court cannot and will not ignore either the plain language of the statute or the Congressional findings that led to its passage. In spite of these findings, however, it is important to note, particularly within the context of a request for a preliminary injunction, that it is not readily apparent that Congress determined the harm it found demands the award of preliminary injunctive relief. In other words, despite its findings, by the plain language of the statute, the Congress seems to have left in tact the ability of judicial officers to apply well-settled and proven principles of equity when deciding whether to grant the type of relief requested here. Simply put, unlike other enactments of Congress which, upon the judgment or finding of a named party or official, seem to require the court do a thing such as issue an injunction, *e.g.*, the Emergency Price Control Act of 1942[1] which provides that an injunc-

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[1] 50 U.S.C. Appx. § 901 *et seq.* (repealed 1956).

tion "*shall* be granted without bond," PASPA, under the sub-heading "Injunctions" provides: "A civil action to enjoin a violation of section 3702 *may* be commenced in an appropriate district court of the United States." 28 U.S.C. § 3703. Thus, it seems reasonable to conclude that a district court may still determine whether the requirements for the issuance of a preliminary injunction have or have not been met, even in light of PASPA.

12. Third, the court cannot say, at this stage in the proceedings, that granting the injunction will result in irreparable harm to the defendants. However, the court also cannot say that granting an injunction in this case is in the public interest. In fact, given that the defendants claim they intend to use monies raised from the activities at issue in this case to balance the State's budget, the converse may very well be true. At this juncture in the proceedings, the court cannot say either way. As such, the public interest factor is, at best, neutral on the issue of whether to grant a preliminary injunction.

13. In considering and balancing the preliminary injunction factors, and in light of the present record, at this early stage of the case, the court concludes that a preliminary injunction is not appropriate. Therefore, IT IS HEREBY ORDERED that the plaintiffs' motion for preliminary injunction (D.I.8) is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

[Filed: 08/10/2009]

Civil Action
No. 08-538-GMS

THE OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball, THE NATIONAL BASKETBALL ASSOCIATION, a joint venture, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, and THE NATIONAL HOCKEY LEAGUE, an unincorporated association,

Plaintiffs,

v.

JACK A. MARKELL, Governor of the State of Delaware, and WAYNE LEMONS, Director of the Delaware State Lottery Office,

Defendants.

Wilmington, Delaware
Wednesday, August 5, 2009
2:00 p.m.
Conference

BEFORE: HONORABLE GREGORY M. SLEET, *Chief Judge*

APPEARANCES:

KENNETH J. NACHBAR, ESQ.,
SUSAN W. WAESCO, ESQ., and
PAULETTA J. BROWN, ESQ., and

MEGAN WARD CASCIO, ESQ.
Morris, Nichols, Arsht & Tunnel LLP
Counsel for Plaintiffs

[2] APPEARANCES CONTINUED:

DAVID A. MARGULES, ESQ.,
ANDRE G. BOUCHARD, ESQ.,
JOEL FRIEDLANDER, ESQ., and
JAMES J. MERKINS, JR., ESQ.
Bouchard Margules & Friedlander P.A.
Counsel for Defendants

MICHAEL A. BARLOW, ESQ.
Counsel for Defendant Markell

(The following took place in chambers.)

THE COURT: Let's have identifications for the record.

MR. NACHBAR: Ken Nachbar.

MS. WAESCO: Susan Waesco.

MS. CASCIO: Megan Cascio.

MS. BROWN: Pauletta Brown.

MR. MARGULES: David Margules for the defendants.

MR. BOUCHARD: Any Bouchard for the defendants.

MR. FRIEDLANDER: Joel Friedlander for the defendants.

MR. MERKINS: James Merkins, defendants.

MR. BARLOW: Michael Barlow for the defendants.

(There followed an off-the-record discussion.)

[3] (The following took place in open court, beginning at approximately 3:05 p.m.)

THE COURT: Please, keep year seats, counsel. This is a continuation of our office conference that we started back in my chambers. As such, it is not a formal session of Court. Counsel are free to, in addressing the Court, remain seated, if you wish. Whatever your comfort level is.

I understand that lawyers are used to standing, that is fine, but you can certainly sit.

So I gather that those discussions, those further discussions, were not fruitful. Is that fair or is there something you want to report to me that will make me smile?

MR. MARGULES: I guess it all depends on what makes Your Honor smile.

We would be prepared to have the Court dismiss the case and Your Honor can do whatever you want. That would make you smile.

We have talked further and our concern is—we have expressed some of our concerns to the Court in letters and also in the conference. There is, I think, something like two—there is two or one and a half motions on the table, an injunction motion and a summary judgment motion in some nascent state. And also we have a proposal from the [4] State for a quick trial.

Our preference remains to have a quick trial. And, as we said, with the discovery that is needed, we can do that any time that works for the Court after January 1st. We do not believe that the plaintiffs have demonstrated entitlement to an injunction. But we do want to stress to the Court that they now

submitted full briefing on an injunction and more than full briefing on a summary judgment motion.

We, trying to be consistent with the Court's guidelines on what's appropriate submission, have really not had an opportunity to make a submission to the Court on the merits of anything. And if the Court is inclined to deal with one or both of the plaintiffs' motions, or otherwise enter some kind of an interim order, we would respectfully request that we have an opportunity to submit full briefing before the Court if it does so.

Secondly, if it is going to be the injunction that we are dealing with, we do renew our request for discovery. We think that they have got an obligation to prove irreparable harm to get even a permanent injunction, for reasons that we are happy to lay out for the Court, given the opportunity to do so, or I can even discuss it today if the Court wants. And there are serious questions about their ability to do so.

[5] We also have questions about the harm that would be inflicted by improvidently entering an injunction, as well as of the balancing of the equities that the Court traditionally does in any kind of injunction, whether it is preliminary, permanent, or temporary. We would respectfully request the opportunity to do so.

Again, our preference is to move forward to a trial. We have tried to work something out with the plaintiffs. That was not successful. And unless the Court enters an injunction, we respectfully submit that there is no injunction.

THE COURT: I will certainly, if Mr. Nachbar wants to respond, I will absolutely hear from you.

One of my reactions to what you have said, Mr. Margules, is that I am going to decline the plaintiffs' invitation to engage a summary process at the outset. So that is not on the table for discussion at this stage, at this stage of the proceedings, remembering that we are talking about the plaintiffs' request for preliminary injunction. I did ask a question back in our informal discussion that I didn't exactly get and answer to, which we will need to discuss, should we proceed forward to, as you suggest, to a trial on the merits of the contentions here today.

Just to refresh your recollection a little bit, [6] so you can think about the question, is, what was—you don't have to answer it right now, because we are going to have a further discussion about it after Mr. Nachbar speaks—what was Delaware doing prior to 1990 there specifically in the statute, in PASPA, insofar as the issue of single versus parlay betting is concerned? Because you will recall that one of the things that I said was that, given the way the issue has been framed, I think probably correctly, and everybody seems to agree that the focus of the parties' and the Court's attention should be on the so-called single game bet—I think that is agreed?

MR. NACHBAR: Yes, that is agreed, Your Honor.

THE COURT:—then you will recall I said, if Delaware wasn't engaged in activity, it may be the case that Mr. Nachbar is right and my initial statements earlier on in the conference were wrong and maybe it is subject to, after all, a summary proceeding.

But at least for now, for the moment, I am going to decline that invitation to accept the motion for summary judgment.

Go ahead.

MR. MARGULES: Your Honor's question, I think, has, as I think Your Honor recognizes, has some subtleties to it. I guess my request would be that we have an opportunity to address that in writing next week.

[7] THE COURT: I think that's fair. I am not trying to ambush you or trap you. I think, as a good lawyer, that's a smart thing to do.

MR. MARGULES: Thank you, Your Honor.

THE COURT: Mr. Nachbar.

MR. NACHBAR: Thank you, Your Honor.

I think it's very clear that there is no fact dispute.

When Mr. Margules is addressing that issue in writing next week, one thing he might want to address is the issue of collateral estoppel, because, after all, the State was involved in a proceeding about the 1976 games. There is a very careful and very thorough description of that. And there is a ruling based on the facts as found by the Court after an evidentiary hearing.

So I don't believe that the State is saying that Judge Stapleton got it wrong. But regardless of what Judge Stapleton said, whether he got it right or wrong, the fact is, collateral estoppel would apply because they won a case based on those very findings. The findings were the State's description of what it was doing.

I don't really think there is a dispute about what was done in 1976.

I think it's also undisputed what the State plans to do in 2009. There may be some subtleties about [8] exactly how they are going to do the single-game

betting. But they plan on doing single-game betting, we know, at a minimum, on NFL games. They plan to do over-under betting on single NFL games. They plan on having betting about major league baseball. They plan to have betting about NCAA football, at least. And they reserve the right to themselves to have betting on all sports.

So I think we have a ripe dispute. And I don't think there really is any factual dispute about either what was done in 1976 or what is proposed in 2009.

The issue is one of statutory construction. And the question is, given what PASPA says—though I guess the first question is: Is it clear on its face? If it's not clear on its face, then what do we glean from the legislative history? Neither of those questions requires discovery. If it's clear on its face, then we look only at the statute. If we need to get into the legislative history, that legislative history is what it is. And we are not going to be taking Senator Biden's or Vice President Biden's deposition to learn what he meant in the Senate Report.

So there really is no factual dispute.

We think, at the end of the day, this can be adjudicated on a summary proceeding.

I guess that leaves us with what we do going [9] forward. We really have two proposals.

THE COURT: I think you are going to have to wait for a moment before that, because I have a ruling to announce.

MR. NACHBAR: I guess, before we get to that, the other things that I would say are, in terms of irreparable harm, there is two aspects to irreparable harm. There is irreparable, and there is harm. And I don't

think that harm is or can be disputed. The Senate found harm. That is why they passed the statute. We have cited the cases that indicate—

THE COURT: I agree. I don't think that that is a matter of fair dispute.

MR. NACHBAR: Great. So the only question is: Is whatever harm that would result from the proliferation of sports betting irreparable?

THE COURT: And I am prepared to rule on that, Mr. Nachbar. I don't need further argument. I have had the benefit of very articulate and well-advanced positions.

MR. NACHBAR: I would only point out that the State has never identified any type of remedy other than injunctive relief. They have never said that there is any other remedy available. We don't believe that there is.

Then, finally, is balance of hardships. It's now, I think, undisputed that the State projects from sports [10] betting, both direct revenue from sports betting and what I will call the synergies, the crossover, the theory that people who come to bet on sports will also play slot machines, their own declaration says the total for that for fiscal 2010 is 17 million dollars.

One could, I guess, dispute how that gets spread out over the course of the year. But it's on average 1.7 million per month, as opposed to a three-billion-plus-budget. So I think it's undisputed that if this were delayed for two months, to have a trial or summary judgment or whatever, the State would lose something like one-tenth of one percent of its budget. We don't think that's irreparable harm for the State. We think that's de minimis.

The only other point I would make is that I believe that it's in everybody's interest, including the State's interest, to get an adjudication of whether the sports betting scheme they propose is compliant with PASPA or violates PASPA. I assume that if it violates PASPA, they would want to know that, and, acting responsibly, would not want to go forward with an illegal betting scheme.

Thank you, Your Honor.

THE COURT: Yes, Mr. Margules.

MR. MARGULES: Your Honor, if I may add a couple things.

[11] Mr. Nachbar said that the State hasn't identified other remedies here.

The fact is that the State hasn't had an opportunity really to deal with anything in connection with this lawsuit. The Governor offered to meet with the heads of the NFL and I believe other leagues to discuss their concerns and to talk about ways to ameliorate them. They were unwilling to meet with the Governor.

Our only opportunity to make submissions in this case so far has been a letter on scheduling and also a conference last week and this week on scheduling. We have not had an opportunity to gather or present evidence on harm that would accompany the entry of an order on the irreparable harm of the leagues. We haven't had an opportunity to present argument on those issues. We haven't had an opportunity to put before the Court or my friends here the legislative history that is filled with uniformly consistent statements that say the intent of the statute is to permit Delaware to do anything it was authorized to do—

THE COURT: But you would agree, Mr. Margules, wouldn't you, that if—and I know you have made your position clear that you don't believe the statute is clear on its face—if the Court concludes otherwise, we don't go there, we don't need to go there, as a matter of the canons of construction? You would agree with that, wouldn't you?

[12] MR. MARGULES: Well, I would phrase it a little differently, Your Honor.

THE COURT: Okay.

MR. MARGULES: First of all, there is a canon of construction in the Federal Courts that I know Your Honor is aware of that says very specifically, and there is lots of Supreme Court authority on this, that a statute will not be lightly construed to interfere with state prerogatives or state law absent a very clear expression of intent.

So we start out there. And there is nothing in this statute that indicates—

THE COURT: I agree—

MR. MARGULES:—an intent of Congress to prevent Delaware from doing anything—

THE COURT: Let me interrupt. That sort of goes to the merits of at least your legal argument with regard to statutory construction. I am looking forward to hearing further on that.

MR. MARGULES: The interesting thing is that that line of authority, that canon of construction, basically says exactly the same thing that the legislative history says: that the statute is not intended to interfere with anything that an excepted state, in this case Delaware, was permitted to do under Delaware law in 1976 or during that whole time period.

[13] We are not going to interfere with that.

That's what the canons of construction say and that's what the legislative history says.

THE COURT: But the statute itself says, to the extent the scheme was actually conducted, that is the initial inquiry, you would agree, would you?

MR. MARGULES: "Actually" is not in the statute. It was at one point, but it was taken out. The word "actually" appears in a different provision of the statute. I believe at one point it was in a draft of that provision but it's not —

THE COURT: I am sorry. I misspoke.

MR. MARGULES: I am happy to discuss this. If Your Honor looks—

THE COURT: The scheme was conducted.

MR. MARGULES: Part of the question is what is a scheme.

THE COURT: I am not prepared to have that discussion today, Mr. Margules. I know that you would have the Court cast it as a lottery. I am not is [sic] so sure—I haven't had a chance to think about that.

MR. MARGULES: If I can kind of crystallize where the rub is.

THE COURT: We are going to get to that.

The Court would like to announce its ruling. [14] Counsel don't seem to want to hear it. Maybe that's understandable, under the circumstances.

But I am going to do it anyway. And then you have your recourse, both sides will have your recourse to the Third Circuit Court of Appeals, should you elect to take that recourse.

So, counsel, in the exercise of my discretion, I have considered the applicable law, and carefully reviewed: the pleadings filed thus far in this matter; the federal statute at issue; the plaintiffs' motion for preliminary injunction; the plaintiffs' opening brief and attachments in support of the motion for preliminary injunction; the parties' additional submissions filed in this case, including the plaintiffs' ten-page, single-spaced letter brief and the defendants' three-page single-spaced letter brief filed on August 3rd of 2009, as well as the defendants' four affidavits filed on August 4, 2009.

I have also considered the arguments of counsel for the parties during the one-hour teleconference, now extended until today, and I haven't kept track of time, but we started at 2:00 informally. That teleconference was conducted on July the 29th of 2009.

After giving due consideration to all of these things, the Court concludes that a preliminary injunction—keep in mind we are at the preliminary injunction phase of [15] these proceedings, counsel—is not warranted in this case. The Court will, therefore, deny the plaintiffs' motion.

With good reason, Federal Courts are typically reluctant to grant the type of relief requested here. Indeed, the Third Circuit has made clear that "a preliminary injunction is an extraordinary remedy that should be granted only if: (1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant," or to a defendant; "and (4) granting the injunction is in the public interest."

That citation, gentlemen and ladies, is the Nutra-Sweet case found at 173 F.3rd, 151. The jump cite is 153.

An additional quote: "A plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." That is the Opticians Association case, found at 920 F.2d 187 which, interestingly enough, had Justice Alito on its panel.

First, based on the record as it stands, the Court is not convinced that the plaintiffs will "likely succeed on the merits" in this case. In fact, both sides vigorously, even today, right up to this very time, and ably, contend that they are entitled to win on the merits. [16] Indeed, the plaintiffs propose, despite the nascent nature of this action, that the Court and the parties go straight into the summary judgment phase of the litigation. Specifically, at Page 2 of their August 3, 2009 letter brief, the plaintiffs ask the Court to treat plaintiffs' motion for injunctive relief as one for summary judgment. In addition, at Page 7 of their letter brief, the plaintiffs write, "Plaintiffs respectfully request that the Court treat their motion for preliminary injunction as one for summary judgment on Count I of the complaint, alleging violation of the Professional and Amateur Sports Protection Act," otherwise known as PASPA. Indeed, the plaintiffs propose "that the Court schedule a summary judgment proceeding such that this matter can be decided prior to the first week of September 2009," and generously offer to rely on the combination of their brief in support of their motion for preliminary injunction and their letter brief of August the 3rd. In this matter, as whenever a party invokes the authority of the Court, the ends of justice dictate that a Judge, whenever possible, where possible, proceed with deli-

beration and caution, especially when a party seeks extraordinary relief of the type at issue here.

On the current record, the Court is simply not in a position to give either side a nod on the merits. Indeed, there may exist factual disputes as to what, if [17] anything, the State actually did in the past with respect to sports gambling; or, as to what, if any, proposed sports betting activities are exempted by the federal statute at issue. On this record, and in light of these critical issues, the Court cannot say that the plaintiffs will likely succeed on the merits.

Second, the Court is not certain that the plaintiffs have demonstrated irreparable harm, so as to warrant the Court granting preliminary injunctive relief. In enacting the federal legislation at issue here, Congress appears to have made specific findings as to the "harm" it intended to address. Nevertheless, and contrary to what the plaintiffs seem to suggest, in the context of a motion under Federal Rule of Civil Procedure 65(a), and considering the language of the actual statute at issue, these findings do not, in this Judge's view, mandate or require under all circumstances that this Court grant preliminary injunctive relief. In other words, this Court is not convinced that the underlying statutorily defined harm is dispositive of the question as to whether the plaintiffs are entitled to preliminary injunctive relief or per se establishes the existence of the threat of irreparable harm that might necessitate the issuance of a preliminary injunction. To the contrary, Third Circuit precedent requires that the Court consider this factor along with and in the context of [18] each of the factors courts traditionally consider when confronted with a request for a preliminary injunction.

In addition, I believe it is noteworthy that when asked some 32 years ago by the National Football League, a party to this action, to grant preliminary injunctive relief barring the State of Delaware from instituting a lottery game based on games of the NFL, an issue at least related to the matter before the Court today, in denying the NFL's request for a temporary restraining order, a respected, indeed, a distinguished Judge of this Court and now the Third Circuit Court of Appeals, the Honorable Walter K. Stapleton, wrote the following: ". . . I should add that the plaintiffs have not demonstrated that the existence of gambling on its games, per se, has or will damage its good will or reputation for integrity. By this, I do not suggest that an association of the NFL with a gambling enterprise in the minds of the public would not have a deleterious effect on its business. Such an association presupposes public perception of the NFL sponsorship or approval of a gambling enterprise or at least confusion on this score. . . . I do find, however, that the existence of gambling on NFL games, unaccompanied by any confusion with respect to sponsorship, has not injured the NFL and there is no reason to believe it will do so in the future. The record shows that extensive gambling," the [19] Judge continues, "on the NFL has existed for many years and that this fact of common public knowledge has not injured plaintiffs or their reputation."

Today I see some irony in the fact that Judge Stapleton made his findings 16 years before the Congressional findings that underpin PASPA and that another 16 years have elapsed since the passage of that act and the reappearance of the NFL, along with other parties, before this Court, making similar claims to being in imminent danger of having their reputations and good will compromised because of yet

another attempt by Delaware to engage in gambling activity associated with professional football and other sports.

The irony is this: During the course of the Court's discussion with counsel last Wednesday, counsel for the defendants made some apparently fact-based assertions which, while certainly not the equivalent of evidence-based findings of a Court or the Congress of the United States, are, I think, at least, relevant to the Court's consideration of the issue of irreparable harm when asked, as I have been asked, to grant a request for a preliminary injunction, or preliminary injunctive relief. Counsel observed, "For example, the New York Times reported two years ago that the MotorCity Casino is owned by the same person who owns the Detroit Red Wings . . . Marian Ilitch [20] co-owns the Detroit Red Wings with her husband Michael, Michael owns the Detroit Tigers . . . In the NBA the Sacramento Kings are owned by the same people who own the Palms Casino in Las Vegas . . . The Chairman and CEO of Harrah's owns a stake in the Celtics"—that would be the Boston Celtics—"There are plenty of instances where the NFL and other sports leagues allow broadcast affiliates to broadcast betting information, betting lines . . . injury reports . . . advice on which side of a bet to be on. Major League Baseball recently loosened its policy on casino and gambling sponsorship, so Harrah's Casino is a signature partner of the Mets. The Mohegan Sun Hotel & Casino operates a Mohegan Sports Bar at Yankee Stadium. The Brewers, the Braves, the Diamondbacks, the Angles, the Dodgers, the Marlins and the Cubs [all major league baseball clubs] all have sponsorship deals with casinos and gambling interests or state lotteries . . . The NHL hosted its 2009 Player Awards in the Palms Casino."

Counsel went on a little beyond that, but I choose not at this point continue this quote.

Clearly, circumstances have changed materially since Judge Stapleton issued his ruling in 1977, that is, the Congress enacted PASPA. This Court cannot and will not ignore either the plain language of the statute or the Congressional findings that led to its passage. In spite of [21] these findings, however, it is important to note, particularly within the context of a request for a preliminary injunction, that it is not readily apparent that Congress determined the harm it found demands the award of preliminary injunctive relief. In other words, despite its findings, by the plain language of the statute, the Congress seems to have left intact the ability of judicial officers to apply well-settled and proven principles of equity when deciding whether to grant the type of relief requested here. Simply put, unlike other enacts of Congress, which, upon the judgment or finding of a named party or official, seem to require the Court to do a thing such as issue an injunction, for example, the Emergency Price Control Act of 1942 which provides that an injunction "shall be granted without bond," PASPA, under the subheading "Injunctions," provides: "A civil action to enjoin a violation of Section 3702 may be commenced in an appropriate district court of the United States."

Thus, it seems reasonable to conclude that a district court may still determine whether the requirements for the issuance of a preliminary injunction have or have not been met, even in light of PASPA.

Third, the Court cannot say, at this stage in the proceedings, that granting the injunction will result in irreparable harm to the defendants. However, the Court also [22] cannot say that granting an injunc-

tion in this case is in the public interest. In fact, given that the defendants' claim they intend to use moneys raised from the activities at issue in this case to help balance the State's budget, the converse may well be true. At this juncture in the proceedings, the Court cannot say either way. As such, the public interest factor is, at best, neutral on the issue of whether to grant a preliminary injunction.

In considering and balancing the preliminary injunction factors, and in light of the present record at this early stage of this case, the Court concludes that a preliminary injunction is not appropriate. The plaintiffs' motion for preliminary injunction is therefore denied.

At some point, when I return officially from vacation, I will issue a more formal written ruling, counsel.

So I think now, Mr. Nachbar, and Mr. Margules, it is left for us to discuss going forward.

Obviously, I think, given the Court's ruling—there have been some interesting new things put on the table—I think we do have to contemplate perhaps proceedings that might lead to ultimately a trial. But having said that, you raise—first, in responding to Mr. Margules's request, and I think a perfectly understandable request, I am fully prepared to grant an opportunity for him [23] to further contemplate the Court's question. That is, what was actually going on during that 1976 to 1990 time frame, because I think that's going to help inform what you have to do in terms of discovery.

I am not—I want to make it clear—I am not prepared to have this case travel the road that has already been traveled, attempted, at least for purposes of non-single-game bets, to determine what is a

skilled game is and what is not. That is not germane to the inquiry, in my view, as to whether the proposed scheme by Delaware violates PASPA.

So I see the question is, from the point of view of discovery, a very narrow one. That is, what were you doing, you—obviously, Mr. Margules, what was the State of Delaware doing. This may, at the end of the day, depending upon the answer to that question—and I don't need to remind anyone, these are all fine lawyers in front of me, that you are all officers of the courts, advocates, zealous ones, to be sure, but officers of this Court. And I expect, as all judges expect, straightforward answers to questions that we propound to you.

That is going to inform to a great degree the balance, and the nature, how these proceedings are shaped going forward. It may lead ultimately, depending upon the answer to, the Court to accept the very proposition that Mr. [24] Nachbar has advanced thus far. That is that maybe the matter would lend itself to summary disposition. I don't know. I am willing to give the parties a chance to play that out.

We have also informing what we need to do the question Mr. Nachbar has posed. That is whether there is some issue of issue preclusion or claim preclusion that the Court is going to have to address based upon Judge Stapleton's 1977 opinion, the 1976 six-day trial.

So that's going to need to be addressed.

These are some of the things we need to talk about right now, in terms of going forward.

I have selected, just to help further guide you, a trial date of December the 7th, perhaps ironically,

Pearl Harbor Day. That wasn't intentional. It's simply the case that, my thinking was that, well, we need to be an expedited schedule. Everyone has agreed upon that. We agreed on that, I think wisely, both sides, during the teleconference. I believe I heard Mr. Margules to suggest maybe a January time frame for trial. This Court is not going to be available. I have a Multi-District Litigation case that cannot be moved, a patent case, in January.

I hate to schedule a matter like this around the holidays, but I tried to do it earlier on in December than not. Frankly, it is a time that I selected that—one of [25] the few breathing periods that we have. I can't move criminal cases, I won't move them, to the advantage of a civil case. The Constitution doesn't permit that.

So that is what we have.

I could possibly go one week later. I don't know that you really want to be beginning this thing on the 14th of December. I really don't think so. Your families might want to disown you. Mine might want to disown me.

That is a possibility. That's a possibility.

We need to provide for the possibility that we may never get there, in light of everything that has been said thus far.

Let me just tell you—and we can talk about these dates—I had also thought about a discovery cutoff of 10/5, roughly two months for all discovery. I don't know, and I don't think we are going to need expert discovery.

MR. MARGULES: I think we are going to need—

THE COURT: To address what issue?

MR. MARGULES: There will be two issues that we have identified. One is if our friends are pressing the claim that the single game with the line is not dominated by chance.

THE COURT: We are not going there, Mr. Margules. The answer to the federal question, Claim 1, is [26] going to resolve Count II, in my view.

MR. MARGULES: Very well.

THE COURT: We are not going there.

MR. MARGULES: We will have to confer about whether we need expert testimony. We would have to work that through. I can get back to the Court next week on that.

THE COURT: Mr. Nachbar, what is your view?

MR. NACHBAR: I continue to believe that summary judgment on Count I is what is appropriate. I don't think that anything about luck or skill is involved in Count I.

THE COURT: I agree absolutely. I don't think that the defendants are contending that.

MR. NACHBAR: Correct.

THE COURT: That is not your contention, is it, Mr. Margules?

MR. MARGULES: Not for Count I, Your Honor.

MR. NACHBAR: But, I do think that there is still a Count II in the complaint, and if PASPA were repealed tomorrow or had never been enacted, we would still have a Count II. And I think, obviously, a ruling that the betting scheme violates PASPA makes Count II moot, because at that point we don't care, probably—

I guess it may not technically be moot because PASPA could be technically repealed, I suppose.

[27] But it's certainly moot for—

THE COURT: Is there some movement to repeal PASPA that I am not aware of?

MR. NACHBAR: Not that I am aware of.

THE COURT: I thought maybe the Vice President was already down there working his magic, I wasn't sure.

(Laughter.)

MR. MARGULES: Your Honor, actually, there is litigation in New Jersey challenging the constitutionality of it.

MR. NACHBAR: I suppose it could be declared unconstitutional, in which case Count II would be very important. My point is, Count I will not determine Count II. In other words, a ruling, if there were one, that the betting scheme doesn't violate PASPA would say nothing about whether it violates the Delaware Constitution or not, because it's just a completely different question.

So, again, what we think would be appropriate would be summary judgment on Count I only, because that one doesn't have contested facts, we believe. When you get to Count II, I agree with Mr. Margules, that expert testimony will be necessary and important because the question then becomes: Is a single game bet on the NFL or another sport predominantly a game of chance?

We think that that is something about which [28] expert testimony would be necessary.

THE COURT: Then the question for both of you is: Can you complete that discovery by the proposed cutoff?

MR. NACHBAR: We can.

MR, MARGULES: We can, too, Your Honor.

THE COURT: So, then, the cutoff for all discovery will be October the 5th. Is that fair? That's my question. Does that give—

MR. NACHRAR: I was really thinking more in time for a December 7 or December 14 trial date. I would think that—we might be able to agree, because we are in the same boat in terms of having to get experts and depose experts, that we might have fact discovery—

THE COURT: Do you want to stage the expert discovery?

MR. NACHBAR: Exactly.

MR. MARGULES: Yes.

THE COURT: That is fine. Tell me if you disagree: I don't think—I know you agree. I don't think the expert discovery is going to inform the summary judgment process.

MR. NACHBAR: Correct.

MR. MARGULES: Again, Your Honor, the question—

THE COURT: Isn't it reasonable to conclude that [29] we are probably going to have experts on either side?

MR. MARGULES: I think the question of whether experts come into summary judgment, really, it's a question of the scope of the summary judgment. If

irreparable harm is part of that mix, then there may be a need for some testimony on that.

But I think that Mr. Nachbar's suggestion, I think, is—and if it is, I join in it, if it is not, then I make it—if we have an opportunity to confer with each other, I think we can probably come with up with deadlines that would work with the parties and hopefully work for the Court.

THE COURT: They have to work for the Court, Mr. Margules.

MR. MARGULES: Absolutely. If they don't, Your Honor will adjust them.

THE COURT: Here is your guidance. I am going to need some decisional time between—here is what I am contemplating—and you can sit down, gentlemen.

Here is what I am thinking about as a summary judgment schedule, which I predict is going to end up only addressing, needing to address, Count I, if at all, if there are no material facts in dispute, then I think that's going to be it as to Count I.

10/12 being the deadline, the cutoff, for filing [30] summary judgment motions. Answers, October 15. Replies 10/26.

You are not briefing under the Local Rule. You are briefing under the Court-imposed schedule. Your page limitations are 20, 20, and ten.

MR. MARGULES: Your Honor, I may have heard the Court wrong. I thought Your Honor said 10/12 for the opening brief and then the answer three days later on the 15th.

THE COURT: If I said the 15th. I may have misspoke. I meant the 19th. And then the 26th.

By the way, Mr. Nachbar, I am going to going impose on plaintiffs the obligation of preparing this case management order. Please get it over to Mr. Margules and his team, let's get it filed no later than ten days from today.

MR. NACHBAR: That is fine. No problem.

THE COURT: File that electronically. It shouldn't really take ten days to do that.

So you heard me on the 20, 20, and ten-page limitation.

MR. NACHBAR: We did, Your Honor.

THE COURT: Anybody want to squeal about that right now?

MR. NACHBAR: I think it may be difficult, and a [31] little bit of latitude may be helpful to both parties.

THE COURT: I am going to give you a clear direction. Here is the basis. The Court is changing its rule. Delaware counsel are used 40 to, 40, and 20. And you inevitably get lawyers to fill up the pages. We don't need that many pages to decide most issues. As you know, Mr. Nachbar, we deal with a lot of complex issues around here. And we find that they are nicely addressed in 20, 20, and ten. And, frankly, I have adopted that rule—the Court is now going to adopt it—from my contact and experience with my colleagues in the Southern District of New York, which I think it goes without saying hear a lot of complex litigation. It works pretty well. I am going to adopt it here.

MR. NACHBAR: We will follow it.

THE COURT: Pretrial order due would be 11/9, close of business, 11/9.

Convene a pretrial conference on 11/19, beginning at 9:30 here in this courtroom.

And as I said, a trial of 12/7. We will talk about the length of trial in a moment. It may be difficult to pin that down exactly. I shouldn't imagine that it would be much longer than, that we would need much more time than five business days to try this case.

Let's talk about that in a moment.

[32] Mr. Nachbar, did you have any thought from a case management point of view as to how you wanted to raise the issue of collateral estoppel if you want to raise it at all?

MR. NACHBAR: I think what I would like to do is see if there is a dispute first. And I suspect there won't be. If there is, then I guess we will deal with it, and collateral estoppel, I think, would be in play at that point. But I don't see a need to say that the other side is collaterally estopped from claiming something that they are, in fact, not claiming.

Let's see what they claim first.

MR. MARGULES: Your Honor, I think maybe the most efficient way for us to deal with this is for us to see whether we can come up with some kind of a stipulation that deals with the issue.

Maybe we can't, in which case we can throw the issue to Your Honor in whatever form is required, whether it is a collateral estoppel ruling or a trial issue. It may very well be that there are at least pieces of it that we can stipulate to.

THE COURT: Is that acceptable?

MR. NACHBAR: That is perfectly acceptable.

I think that there were published materials about what Delaware was doing in 1976. It was, obviously, a [33] public program. So I don't think it's really subject—the type of thing can be disputed. It's not like who ran the red light.

Second, there are briefs that the State submitted. And third, there is a ruling that the Court made.

So I think, when we piece all that together, I think we will be able to stipulate.

MR. MARGULES: I think that the tough issue, if there is one, is going to be the scope of what, of how we define what the State was doing. Are we just talking about the rules of particular games? Are we talking about the existence of statutes and regulations? Are we talking about the way in which the games were marketed? The way in which participants came and played the games?

But again, I think those are all facts that we can get to.

I do think we can deal with them.

THE COURT: Okay. So, counsel, I am going to leave it to you on your own, during your further meet-and-confer, to come up with a schedule for exchanging expert reports. That should be built into the schedule.

So, my question to you is, counsel, do you believe that the dates the Court has proposed are do-able? It's a very compressed schedule. You know, both of you, [34] things usually take a good bit longer here.

MR. MARGULES: I think we can probably make it work. The one date that gives us a little concern is one that parties tend to work out. If it is a problem,

the termination of discovery, it may be that we will get out in a month or two months and feel that we need a couple of other days.

But again, typically, Mr. Nachbar and I have worked together frequently, we can usually come to an agreement and come to the Court with that.

THE COURT: Because this is a little different from Chancery Court practice.

MR. MARGULES: I understand. It doesn't necessarily mean that we have to push out summary judgment briefing or anything like that.

THE COURT: All I am saying, you have already said the magic words, you need to come to the Court.

MR. MARGULES: Absolutely. We understand.

MR. NACHBAR: We think it is do-able, and we will abide by it.

THE COURT: All right. Length of trial. Difficult to say, I know. But what do you think?

MR. NACHBAR: I would think five days is more than sufficient. I have not had a chance to confer with my clients, obviously, since I have been in court.

[35] But I would think that five days would be sufficient.

MR. MARGULES: We agree. I am a little concerned that the hockey players might need translators, which will slow things down.

But other than that . . .

(Laughter.)

THE COURT: Counsel, let me just say a few words, additional words, about my process, since I don't frequently see the two of you and your colleagues over here.

Discovery disputes, should they occur, are not the subject of motions practice, counsel. You are not permitted to file motions to compel or motions for protection.

What you are permitted to do is come to the Court, after you have made every effort to resolve your disagreements on your own—and I do want to insist and will insist that those efforts involve more than just writing to one another, through letter or e-mail. You have got to talk, to try to work things out. If you can't, call up chambers. Chambers will give you a date for a teleconference.

I am only going to do that with you three times. Given this short span of time, I cannot imagine—I hope you are not here at all—but I can't imagine that you [36] would use that up.

So you will get on the phone, and my staff will tell you that, they will give you a conference date, a teleconference date and tell you no less than 48 hours before the date I need a letter jointly submitted, of bulleted items, not an argument. I don't want an argument. I will reject and send back the letters.

We will get on the phone. I guarantee you, almost, that we will resolve the dispute without the need for further submissions.

If I feel the need for further submissions, we will do them on an abbreviated basis in the form of letter briefs, very short letter briefs, should some novel issue arise in this case.

The pretrial order is on the website. You have to follow it, lest you waive something you don't want to waive. Download it. Lead counsel are responsible for making sure that you have complied with the pretrial order.

To the extent that you feel a need to engage in motions practice, and I am talking specifically about motions in limine, those motions, you have to agree on a schedule for the identification of those issues and briefing them and submitting those, complete briefs to tell Court at least by the due date for the pretrial order.

Any questions about that?

[37] Counsel, other than that, I think we have covered all of the scheduling matters that we need to talk about.

Anything else from a scheduling point of view that we need to talk about?

MR. MARGULES: Not from us, Your Honor.

MR. NACHBAR: Not that occurs to me right now.

THE COURT: Anything else at all, counsel?

MR. MARGULES: Not from us, Your Honor.

THE COURT: Mr. Nachbar. Anything else at all?

MR. NACHBAR: No, Your Honor.

THE COURT: Counsel, have a good days [sic].

(Conference concluded at 3:52 p.m.)

APPENDIX D

UNITED STATES COURT OF APPEALS,
FOR THE THIRD CIRCUIT

[Filed 09/29/2009]

No. 09-3297

OFC COMM BASEBALL, an unincorporated association doing business as Major League Baseball; NATL BASKETBALL ASSN, a joint venture; NATL COLLEGIATE ATHLETIC ASSN, an unincorporated association; NATL FOOTBALL LEAGUE, an unincorporated association; NATL HOCKEY LEAGUE, an unincorporated association,

Appellants,

v.

JACK A. MARKELL, Governor of the State of Delaware; WAYNE LEMONS, Director of the Delaware State Lottery Office,

Appellees.

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 09-cv-00538)

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, *Circuit Judges*.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellee having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ Thomas M. Hardiman
Circuit Judge

Dated: September 29, 2009

CLW/PBD/cc: Pauletta J. Brown, Esq.
Megan W. Cascio, Esq.
Kenneth J. Nachbar, Esq.
Susan W. Waesco, Esq.
Andre G. Bouchard, Esq.
Joel E. Friedlander, Esq.
David J. Margules, Esq.

APPENDIX E

CONSTITUTIONAL PROVISION

U.S. Const. amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX F

FEDERAL STATUTES

28 U.S.C. § 3701: Definitions

For purposes of this chapter—

(1) the term "amateur sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),

(3) the term "professional sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

28 U.S.C. § 3702: Unlawful sports gambling

It shall be unlawful for—

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3704: Applicability

(a) Section 3702 shall not apply to—

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that—

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

(4) parimutuel animal racing or jai-alai games.

(b) Except as provided in subsection (a), section 3702 shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).